

Jackman (Migration) [2018] AATA 4735 (11 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr William Declan Jackman
CASE NUMBER:	1707702
DIBP REFERENCE(S):	BCC2016/4137232
MEMBER:	P. Maishman
DATE:	11 October 2018
PLACE OF DECISION:	Perth
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 11 October 2018 at 4:35pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Partner Temporary) – Schedule 3 criteria waiver – compelling reasons – emotional hardship – genuine and continuing relationship – credible witness – statements of support – sponsor’s health – sponsor’s able to visit or relocate to Ireland financial hardship – recession in Ireland – decision under review affirmed

PRACTICE AND PROCEDURE – decision made on review

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2 cl 820.211 Schedule 3 criteria 3001, 3003, 3004

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 29 March 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 7 December 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d)(ii) because the delegate found that the applicant did not meet the Schedule 3 criteria and was not satisfied there were compelling reasons to waive that requirement.
4. The applicant appeared before the Tribunal on 5 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Alicia Ryan, Kerri Richardson and Heather Cochrane.
5. The applicant was represented in relation to the review by his registered migration agent.
6. The Tribunal found the applicant, sponsor and witnesses were forthright and honest in their evidence.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The Tribunal also had before it a copy of the Department's file. The applicant provided a copy of the delegate's decision record to the Tribunal with his application.
9. The information contained in the Department's file and the delegate's decision record can be summarised as follows. The applicant is a 32 year old citizen of Ireland. His parents and a sister remain resident in Ireland. The sponsor is 33 year old Australian citizen. Neither party claims to have been in a previous relationship. The applicant claims to a first met the sponsor in November 2013 and they're committed de facto relationship began on 25 December 2013.
10. The decision record indicates the applicant arrived in Australia on 7 May 2009 as the holder of a Working Holiday visa (subclass 417). The applicant sought, and was granted, an extension of that visa so that the Working Holiday visa ultimately ceased on 7 May 2011. The applicant remained in Australia as an unlawful non-citizen until 7 December 2016 when he was granted a Bridging visa E pending determination of the application he made on 7 December 2016 for a Partner (subclass UK 820/BS 801) visa.
11. The following documents were filed with the Tribunal prior to the hearing:
 - a. Written submissions from:
 - i. the applicant dated 26 July 2018;

- ii. the sponsor dated 27 July 2018; and
 - iii. the applicant's registered migration agent dated 30 July 2018.
- b. Statutory Declarations from:
 - i. Sharyn Swartz dated 23 July 2018; and
 - ii. Robert Joseph Ryan dated 23 July 2018.
- c. Letters of support/statements from:
 - i. Jill Jackman dated 24 July 2018;
 - ii. Heather Cochrane dated 25 July 2018;
 - iii. Orla Fitzhenry dated 26 July 2018;
 - iv. Alan Fitzhenry dated 26 July 2018;
 - v. Declan Jackman dated 27 July 2018; and
 - vi. Faith and John Nichols (undated).
- d. Various medical reports, invoices and documents for the sponsor:
 - i. radiology request dated 15 April 2009;
 - ii. histopathology report dated 2 March 2016;
 - iii. dental invoice dated 12 March 2018;
 - iv. pathology clinical notes and report dated 16 April 2018;
 - v. invoices for naturopathy items dated 2 June 2018 and 14 July 2018; and
 - vi. medical Statement of Account dated 13 July 2018.
- e. Various medical reports, invoices and documents for the applicant:
 - i. dental surgery receipt dated 3 September 2016;
 - ii. dental discount offer addressed to the applicant valid to 29 November 2017;
 - iii. invoice for clinical imaging dated 28 July 2017;
 - iv. specimen analysis request forms dated 4 August 2017 and 6 July 2018; and
 - v. medical service provider tax invoice dated 6 July 2018.
- f. Various other documents:
 - i. dog registration and ownership details from 24 October 2014;
 - ii. CSB account confirmation as an 6 March 2015;
 - iii. BankWest Borrower Applicant Copy and BankWest E-saver statement for the period October 17 to April 18;
 - iv. energy bill addressed to the sponsor dated 6 July 2018;
 - v. Optus invoice dated 26 July 2018;

- vi. Synergy invoice for the period May 2018 to July 2018 addressed to the applicant;
- vii. Electrical goods invoice dated 15 July 2017;
- viii. flybuys account screenshot;
- ix. the sponsor's Mobile phone invoices dated 8 July 2016 and 8 July 2018;
- x. sponsor's private health insurance statement 2018;
- xi. copy of the parties' drivers licences;
- xii. contract purchase and insurance document for vehicle ;
- xiii. superannuation beneficiary statement (undated);
- xiv. flight itinerary in the sponsor's name; and
- xv. a number of photographs and screen shots displaying personal, family and social situations.

12. The applicant and sponsor gave evidence separately at the hearing. The Tribunal found the applicant and sponsor to be credible and honest witnesses and accepts their oral evidence on that basis. The Tribunal has considered their oral evidence together with the additional documentary evidence submitted to the Tribunal to reach the findings below.
13. The applicant gave oral evidence at the hearing. He confirmed he was on a working holiday visa that expired in May 2011. He says Ireland was still in recession in 2011, he loved Australia and he had friends and work. In Australia, his work had given him self-worth and the ability to make something of himself whereas in Ireland he would be on the dole. He remained working in Australia and first met the sponsor in 2013 from when their relationship developed. He did not immediately inform the sponsor or her family of his visa status as he was embarrassed and did not want them to think their relationship was based on his need to regularise his status. The applicant acknowledged that he shouldn't have stayed in Australia unlawfully and regrets his actions in that regard.
14. The statutory declarations and letters of support from third parties, documents such as dog registration, household bills, mobile phone records, photographs, bank account statements filed with the Tribunal by the applicant are mostly relevant to the question of whether the applicant and sponsor are in a genuine spousal or de facto relationship. The Department has not formally assessed whether the applicant and sponsors are in a genuine spousal or de facto relationship. Accordingly, the Tribunal has also refrained from formally considering this issue. For the purposes of deciding this application only the Tribunal presumes, without making any findings, that the applicant and sponsor are in a genuine and committed de facto relationship.
15. The issue in the present case is whether there are compelling reasons to waive the requirement to meet the Schedule 3 criteria.

Does the applicant meet Schedule 3 criteria?

16. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
17. The applicant acknowledges in his oral evidence and via his agents submission that he last held a substantive visa on 7 May 2011 and did not lodge his Partner visa application within

28 days of holding a substantive visa. The applicant submits that the Schedule 3 criteria be waived given there are compelling reasons for not meeting those criteria.

18. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

19. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
20. The Department's decision record, provided to the Tribunal by the applicant, details the applicant held a substantive (subclass 417) visa until it ceased on 7 May 2011 and remained in Australia unlawfully after it ceased. He applied for the partner visa on 7 December 2016.
21. There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that he entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision.
22. The applicant's representative provided the Tribunal a written submission on 30 July 2018. The applicant does not dispute the details contained in the Department's decision record and concedes he was not the holder of a substantive visa within 28 days of applying for this visa.
23. The Tribunal finds the applicant last held a substantive visa when his working holiday (subclass 417) visa ceased on 7 May 2011. This is the 'relevant day' as defined in criterion 3001(2)(c)(i) of Schedule 3.
24. As the visa application was made on 7 December 2016 the Tribunal is not satisfied the application was validly made within 28 days of the relevant day.
25. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.
26. The applicant's representative submitted that Criterion 3004 of Schedule 3 was relevant.

27. Criterion 3004

28. Criterion 3004 of Schedule 3 requires that the Minister be satisfied that the applicant is not the holder of a substantive visa because of factors beyond his or her control, that there are compelling reasons for granting the visa, and that the applicant has complied substantially with the conditions applicable to the last of any substantive visas and any subsequent bridging visa held by the applicant. In addition, the Minister must be satisfied that the applicant would have been able to be granted the visa if the applicant had applied on the day he or she last held a substantive or criminal justice visa; or would have satisfied the criteria when he or she last entered Australia unlawfully; that the applicant intends to comply with any conditions of the visa; and the last visa or entry permit held (if any) was not subject

to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or further entry permit, while the holder remained in Australia.

29. The Tribunal has found that the applicant last held a substantive visa on 7 May 2011.
30. The applicant was not the holder of a substantive visa because he did not apply for any other visa when his visa expired on 7 May 2011.
31. The applicant gave oral evidence, consistent with the evidence on file, that he met the applicant in 2013 and the applicant and the sponsor commenced their de facto relationship in 2014. There is no other evidence the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive visa.
32. The Tribunal finds the applicant would not have been entitled to be granted a partner visa on 11 May 2011 and so does not satisfy criterion 3004.

Compelling reasons

33. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
34. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
35. The applicant's representative submitted that in May 2011 when his work visa ceased, the applicant's home country Ireland was experiencing one of the deepest recessions ever recorded in the developed world. She states Ireland offered no prospects and Mr Jackman had no options upon his return to Ireland. The representative submitted that the duration of the applicant and sponsors relationship, the sponsor's fertility issues and potential hardship to the couple are compelling reasons for the grant of a partner visa.

The length of the applicant and sponsors relationship

36. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) is that there are compelling reasons for not applying those criteria. The fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.
37. The applicant provided with his application a number of documents addressing the various aspects of the relationship. He refers to having a genuine relationship with the sponsor and that they had been living together from December 2013. The couple provided additional

evidence of the relationship to the Tribunal and the applicant and the sponsor and their witnesses spoke in oral evidence about the couple having a genuine and long term relationship. The Tribunal makes no assessment as to the nature of the applicant's relationship with the sponsor and accepts at face value the claims made by the parties that they were, and continue to be, in a genuine relationship together since 2014.

38. The Tribunal is not satisfied that the genuineness, mutual commitment, continuing nature and longevity of the parties' relationship or the parties' temporary separation are on their own, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria. The Tribunal is not satisfied on the evidence that these are compelling reasons not to apply the Schedule 3 criteria.

The applicant and sponsors desire to start a family

39. The applicant's representative made written submissions to the Tribunal that the applicant's partner wants a child, and they have been trying to conceive under the guidance of a naturopath. Evidence in the form of a pathology request form dated 4 August 2017 for specimen analysis tests was presented to the Tribunal. It was submitted that the waiting time for an offshore partner visa to be processed was up to 24 months by which time the sponsor would be 34 years old and may lose her chance to have a child.
40. The applicant gave evidence at hearing that he and the sponsor had been trying to conceive for about two years. They started getting tests done about 12 months ago which has resulted in them getting the guidance of a naturopath.
41. The Tribunal was concerned that possible infertility issues appeared to be first identified on 4 August 2017 after the Department's decision reasons was given to them. The applicant said that this was just coincidence.
42. The sponsor gave evidence she has discussed IVF treatment with her doctor but preferred to try naturopathy first. The naturopath has provided a routine including detox, supplements and diet. She sees the Naturopath every couple of months. The sponsor agreed they would be able to follow the naturopath's guidance whether she was in Australia or overseas.
43. The representative's submission about the processing time for an offshore partner visa reflects the worst-case scenario. The Tribunal notes that at the time of the Tribunal's decision the Department's website¹ indicates that 75% of offshore partner (SC309) visa applications are processed within 13 months. Given the parties have collected significant evidence about their relationship there is no reason to think that a partner visa, properly made by the applicant, would take longer than the majority of cases processed by the Department.
44. At hearing the representative raised that the applicant would face a three year ban if he wants to apply for a subclass 309 partner visa from offshore which would further delay the opportunity for the couple to start a family. The Tribunal notes that such a bar is generally imposed by Public Interest Criteria 4013 and 4014, neither of which is required to be met by an applicant for a subclass 309 visa. I have also considered whether the applicant faces issues meeting the special return criteria of 5001 and 5002, but consider these provisions do not appear to apply if the applicant leaves voluntarily and is not subject to either a deportation order or removal order. The applicant should satisfy himself of the effect of the Public Interest Criteria in respect of other visa categories he may choose to apply for.

¹[https://www.homeaffairs.gov.au/trav/visa-1/309-/Partner-\(Provisional\)-visa-\(subclass-309\)-and-Partner-\(Migrant\)-visa-\(subclass-100\)-document-checklist](https://www.homeaffairs.gov.au/trav/visa-1/309-/Partner-(Provisional)-visa-(subclass-309)-and-Partner-(Migrant)-visa-(subclass-100)-document-checklist) accessed 8 October 2018

45. Difficulties with conception are common in many relationships, including those with age-related fertility concerns. Submissions of the representative, the applicant, and the sponsor given to the Department in March 2017 make no mention of attempts to start a family or of difficulty conceiving. A broad statement that the sponsor may lose her chance to have a child if she has to wait for the applicant to be lawfully in Australia is not sufficient. The Tribunal accepts that fertility is age-related and the possibility of having a child may decrease with age. The sponsor could travel with the applicant until his visa is processed. The sponsor and applicant could meet periodically overseas. The treatment the parties are undergoing can be obtained readily offshore. The Tribunal is not convinced that this is a compelling reason in the circumstances of this case.

Emotional Hardship

46. The applicant's representative submitted the refusal of the visa would have a considerable impact on the sponsors mental well-being and emotional health to extent that the Tribunal is not in a professional position to determine. Ms Cochrane statement dated 25 July 2018 identified she had been friends with sponsor for 20 years and was a mental health worker. Ms Cochrane was highly concerned for the sponsors mental health should the applicant be removed from the country. Ms Cochrane says having known the sponsor for many years she began to notice signs of anxiety and depression whenever she and the sponsor met. She is concerned that the applicant is the sponsor's main support system not only in the relationship but also socially due to the sponsor's long-term suffering with social anxiety. Ms Cochrane was concerned that the long-term impact of increased isolation may exacerbate the sponsor's stress and anxiety may all pose serious risk to the sponsor's mental health.
47. Ms Cochrane gave oral evidence that she had not undertaken any clinical assessment of the sponsor. She expressed the view that she believed it was important for the sponsor's mental health that the applicant remained in Australia to support her.
48. The applicant's evidence was that the sponsor had no medical conditions as far as he was aware.
49. The sponsor gave evidence that she has no diagnosed medical conditions. She is very busy at work and, if the applicant had to leave Australia, she would get stressed because the applicant does so much around the house to support her working long hours. He also provides moral and emotional support when work is busy.
50. Ms Richardson's evidence confirmed that the applicant provided the sponsor (her daughter) emotional support and looked after the house and dog while the sponsor was at work. Ms Richardson said the sponsor's extended family is supportive of the applicant and sponsors relationship and that the applicant is a part of their family.
51. There is no probative medical evidence that indicates either the applicant or sponsor would be any more impacted than any person separated from their partner for a time. The Tribunal acknowledges that the applicant having to leave Australia would have an emotional impact on the sponsor. There are no restrictions to the sponsor travelling to see the applicant either in Ireland or any other country to which they wish to travel. The Tribunal is not convinced there are any health issues of either the applicant or the sponsor that are compelling reasons in the circumstances of this case.

Financial Hardship

52. The applicant said he has been gone from Ireland for too long and would have trouble picking up work. The parties submitted that the sponsor is the main breadwinner and is over the age at which she could obtain a "working" visa for Ireland. The economic circumstances

in Ireland have improved but are still not as favourable as those in Australia. The sponsor has been employed with her current employer for three years.

53. The sponsor's employer, Faith and John Nichols, provided a statement saying the sponsor has been rewarded with a substantial salary increase in acknowledgement of her skills. They say it would be very hard on their business to lose such an exceptional and valued manager who is relied upon for support and advice. The employers state that employees' partners are often extremely unhappy about the commitment demanded by the industry and consider the applicant supports the sponsor totally in her dedication to work. They agree they would do whatever it would take to keep the sponsor in their employ.
54. The Tribunal accepts that the relocation of the applicant or of both parties to Ireland would be financially disruptive. The parties have not investigated alternatives to an age restricted working visa, such as an equivalent to the Australian partner visa, which might allow the sponsor work rights in Ireland.
55. The Tribunal does not consider the economic situation in Ireland in April 2011 to be a compelling reason to waive the Schedule 3 criteria in this case.
56. The Tribunal is not convinced that there would be financial hardship that would be compelling reasons to waive the Schedule 3 criteria in this case.
57. Having taken into account all of the evidence before it, the Tribunal is not satisfied that there are, either separately or cumulatively, compelling reasons for not applying the Schedule 3 criteria in this case.
58. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
59. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

60. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

P. Maishman
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.